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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 6[illegible]

CLEONA HOOPER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Cleona Hooper, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the order entered against him on July 2, 1970, by the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *Cleona Hooper*, (No. 20,205), affirming the judgment of the United States District Court for the Eastern District of Tennessee in *United States* v. *Hooper*, ... F. Supp. ..... (E.D. Tenn. 1969).

OPINIONS BELOW

The order of the United States District Court for the Eastern District of Tennessee, memorandum opinion and order denying defendant's motion to suppress evidence of the contraband seized from him on his premises, is printed in the appendix hereto, *infra*, Appendix A. The order of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the appendix hereto, *infra*, Appendix B.

The opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States of America v. Roy Whitehead* (No. 18,607), on the basis of which petitioner's conviction was affirmed, is printed in the appendix hereto, *infra*, Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court err in denying petitioner Hooper's motion to quash search warrant and suppress testimony for the reason that the search warrant was issued without probable cause, unlawfully executed, and such warrant and its supporting affidavit were insufficient.

2. Whether the trial court erred in denying petitioner Hooper's claim that the requirements of the section of the Internal Revenue Code upon which the indictment is based compels self-incrimination, in violation of the 5th Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V:

> No person shall be * * * nor shall be compelled in any criminal case to be a witness against himself, * * *.

* * *

Title 26 U.S.C.

§ 5522. Withdrawal of distilled spirits to manufacturing bonded warehouses

(a) Authorization.—Under such regulations and requirement as to stamps, bonds, and other security as shall be prescribed by the Secretary or his delegate, any manufacturer of medicines, preparations, compositions, perfumery, cosmetics, cordials, and other liquors, for export, manufacturing the same in a duly constituted manufacturing bonded warehouse shall be authorized to withdraw, from the bonded premises of any distilled spirits plant, so much distilled spirits as he may require for such purpose, without the payment of the internal revenue tax thereon.

* * *

§ 5686. Penalty for having, possessing, or using liquor or property intended to be used in violating provisions of this chapter.

(a) General. It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

* * *

§ 5601—No Person—

* * *

(7) Unlawful production, removal, or use of material fit for production of distilled spirits.—except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; or

(8) Unlawful production of distilled spirits.—not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material; or

* * *

(12) Unlawful removal or concealment of distilled spirits.—removes, other than as authorized by law, any distilled spirits on which the tax has not been paid or

determined, from the place of manufacture or storage, or from any instrument of transportation, or conceals spirits so removed; or

* * *

Title 39, Tennessee Code:

"39-2523. ATTEMPT TO MANUFACTURE INTOXICATING LIQUOR.—The offenses described in §§39-2521, 39-2522 shall be deemed to have been committed by any person who shall attempt to manufacture intoxicating liquor, either by assembling the necessary apparatus for the purpose of manufacturing intoxicating liquor as prohibited by law, or by doing any act preparatory to such manufacture; and any such attempt shall be punished as described in §39-2522. [Acts 1923, ch. 14, §2, Shan. Supp., §6793a24b1; Mod. Code 1932, §11248.]"

"39-2524. POSSESSION OF A STILL—PENALTY.—It shall be unlawful for any person to have in his possession or control any still or other apparatus, or part thereof, used or intended to be used for the purpose of manufacturing intoxicating liquor as prohibited by law, and any person convicted of a violation of this section shall be deemed guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), and by confinement in the county jail or county workhouse for a period of not more than one (1) year in the discretion of the trial court [Acts 1923, ch. 12, §1; Shan. Supp., §6798a25b1; Mod. Code 1932, §11249.]"

"39-2525. POSSESSION OF STILL AS PRIMA FACIE EVIDENCE OF PURPOSE.—When any person is found in the possession or control of any still or apparatus, or part thereof, suitable or designed for the manufacture of intoxicating liquor, such possession or control shall be deemed prima facie evidence in a prosecution under §§39-2521—39-2524 that such possession or control was for the purpose of manufacturing intoxicating

liquor as prohibited by law [Acts 1923, ch. 12, §2; Shan. Supp., §6798a25b2; Mod. Code 1932, §11250.]"

* * *

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located. As amended Apr. 9, 1956, eff. July 8, 1956.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., §957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall

state the grounds or probable casue for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at last one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

* * *

STATEMENT OF THE CASE

A two count indictment (incorporated in the appendix at p. A28) was returned against Cleona Hooper on March 4, 1969. The first count charged Cleona Hooper with possessing property intended for use in violating the provisions of the Internal Revenue Laws of the United States, in violation of Title 26, §5686(a), U.S.C.

* * *

At the trial of this cause on May 12, 1969, appellant Hooper raised the objection that compliance with the statutes upon which the indictment was based would have required him to incriminate himself in a potential prosecution by the State of Tennessee, in violation of the Fifth Amendment to the Constitution of the United States of America. The trial court denied Hooper's claim of self-incrimination. (Transcript of Evidence and Proceedings, pp. 7-9.)

Appellant Hooper waived arraignment and entered a plea of not guilty to both counts of the indictment. Hooper filed a motion to quash search warrant and suppress testimony which is incorporated in the Appendix at p. A29, which motion the trial court was pleased to overrule.

The case was called for trial on May 12, 1969, at which time Hooper waived trial by jury and special findings of facts by the court. The court found appellant Hooper guilty as to both counts of the indictment, sentenced him to five years' confinement on count two, and ordered a fine in the sum of $2,500 on count one.

* * *

Whereupon the case was appealed to the United States Court of Appeals for the Sixth Circuit on two issues.

First, that the Court erred in denying appellant Hooper's motion to quash search warrant and suppress testimony for the reason that the search warrant was unlawfully executed and the warrant and its supporting affidavit were insufficient. Secondly, the trial court erred in denying appellant Hooper's claim that the requirements of the section of the Internal Revenue Code upon which the indictment is based compels self-incrimination, in violation of the 5th Amendment to the Constitution of the United States. The Court of Appeals affirmed, concluding that its in banc determination in *United States* v. *Roy Whitehead* (Appendix C), decided March 3, 1970, was controlling as to the central issue presented as to the second proposition of defendant's appeal. The first contention was held to also be without merit. Whereupon the petitioner seeks redress through a Writ of Certiorari by the Supreme Court to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

The petitioner will first address himself to the first proposition placed before the Court for review, i.e., whether the Court erred in denying petitioner Hooper's motion to quash the search warrant and suppress testimony for the reason that the search warrant was unlawfully executed and the warrant and its supporting affidavit were insufficient. The petitioner submitted to the trial court no less than 13 grounds upon which the evidence and testimony should have been suppressed. The petitioner addresses himself to certain specific grounds as follow.

It is the emphatic contention of the petitioner that a search warrant based upon "reliable official information" with no indication as to what or who "reliable official information" was, coupled with corroboration by supposedly

pertinent observations lasting only ten minutes, five days before the warrant was issued, seven days before the warrant was executed, and nine days after the affiant received the alleged information, was not such a warrant as provided probable cause and was most certainly not a reasonable search under Article IV of the United States Constitution and the cases of *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (61564) and *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (12769).

Thus, the above contention breaks into two parts. The first involving the direct problem of probable cause, and the second that of the delay in arrest or search upon probable cause.

Petitioner's position is that there was not probable cause shown upon which the Commissioner was justified in issuing the requested warrant. Had the Commissioner issued the warrant upon the "reliable official information" alone, there could be no doubt that probable cause would be lacking. There is no proof (a) of the reliability of the informant or informants or (b) that the informant or informants knew anything of his own knowledge. It is tantamount that when relying on an informant that the above two propositions be adequately satisfied. In this case, neither has been satisfied. *Aguilar v. Texas, supra*, and *Spinelli* v. *U. S., supra*.

Was such alleged information capable of being corroborated? In *Spinelli* the Court said,

> "A Magistrate cannot be said to have properly discharged a Constitutional duty if he relies on an informer's tip which—even when partially corroborated —is not as reliable as one which passes Aguilar's requirements when standing alone." *Spinelli, supra.*

One could lift the language straight from *Spinelli* and apply it to the present facts without the least strain.

> "Apply these principles to the present case, we first consider the weight to be given the informer's tip when it is considered as part from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his Constitutional function. Though the affiant swore that his confidant was 'reliable'."

(in our case we don't even have a confidant, except by implication as the agent received "reliable official information". App. I p. A35.)

> "He offered the Magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar's* other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation."

(In our case, there is no evidence of *any* statement of underlying circumstances from which the informant could have concluded Hooper was violating the liquor laws. App. I p. A35).

> "We are not told how the F.B.I.'s source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him."

(In our case, neither how the special investigator of the A & TTD's source received the information is shown nor is it alleged that any informant personally observed Hooper at work or bought whiskey from him. App. I pp. A35-A36.)

> "Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable."

(Ditto.)

". . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused criminal activity in sufficient detail so that the Magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or accusation based merely on an individual's general reputation."

There is no description of activity whatsoever in our case. However, it is not lacking in attacking the alleged reputation of the petitioner, as it alleges Hooper was a known liquor law violator with a Federal criminal record and a current reputation for violating the whiskey laws. App. I p. A35. It is thus the position of the petitioner that this part of the affidavit was much less than that in the *Spinelli* case and not even capable of being corroborated.

In our case, two activities are held out as corroborating the above "information". These two were seen in a ten minute period two days after the alleged information was received and five days before the agent sought the search warrant, and consisted of the carrying of some boxes or cases similar to those used in the area to package non-taxpaid distilled spirits and the carrying of several one-gallon plastic jugs, again similar to those used in the area to package non-taxpaid distilled spirits. The mind shudders at the criminal implications of such sights. These same one-gallon bottles are often used to carry many liquids or granular materials not consisting of distilled spirits. They are also used as fishing markers on the numerous T.V.A. reservoirs throughout the State of Tennessee. As for the boxes and cases, everything from lawbooks to bubblegum is shipped in the described boxes or cases. It will be noted that the boxes or cases are not identified or described by

size, shape or color. App. I p. A36. The officers saw no liquids, smelled no alcohol nor had any other physical proof of illegal conduct. The weakness of the proof is further shown by the fact that the agent obviously did not feel he had sufficient evidence to arrest for the supposed felony being committed in his very presence, but waited five days to seek a search warrant. Hooper could have been in and out of the liquor business several times during the delays that preceded his arrest and the search. It is certainly true that the Court could never allow an arrest under the circumstances described by the agent. *Giordenello* v. *United States*, 357 U.S. 780, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (63058); *Wongsun* v. *United States*, 371 U.S. 471; *Beck* v. *Ohio*, 379 U.S. 89, U.S. S.Ct. 223, 13 L.Ed.2d 142. Nor would a search indigent to the above alleged arrest be proper. *Chimel* v. *California*, 89 S.Ct. 2034.

All of the above of which must lead us to conclude that there was insufficient probable cause to allow the Commissioner to issue the search warrant.

We next lend our attention to the extreme delay evidenced in the above case as pointing to the inevitable conclusion that probable cause had vanished, if in fact it ever existed: (a) Two days from "information" to observation (December 6 to December 8) (b) five days from observation to application for warrant (December 8 to December 13).

Federal Rules of Criminal Procedure, §41(d) provides a maximum of ten days in which a warrant must be executed and returned. It also makes other provisions for inventory in the presence of defendant and copy to him at that time. Present cases are clear that any delay within the ten day limit is acceptable. *Murray* v. *U. S.*, C.C.A. R.I. (1924), 2 F.2d 56. However, the Federal rules are silent

as to a delay in first obtaining the warrant. It must be assumed for probable cause to exist that the application must be within a reasonable time under all the circumstances.

Petitioner submits that the two day delay from the so-called "information" and the five days from the observation to the application for warrant are unreasonable in that a readily movable commodity, such as gallon jugs, and boxes or cases allegedly containing alcohol, might be moved many times over in such a lengthy delay; therefore, because of the delay, unsupported by more recent observations, the probable cause, if indeed any did exist (which we deny), had vanished as the flame from a single match burning itself out.

Petitioner's next ground is "that the warrant of search is a general warrant in that it does not direct for the search of particularly described property."

This warrant directs for not only a search of the residence of Cleona Hooper, but in addition thereto, all outbuildings and appurtenance thereto. The property actually searched, insofar as it is known, included the residence, an outbuilding and numerous automobiles parked near the Hooper residence.

The Fourth Amendment to the Constitution of the United States compels that the property to be searched must be particularly described.

The word "appurtenance" has been the subject of much litigation. One definition is "that which belongs to something else. Something annexed to another thing more worthy." *West, Words and Phrases,* 1958, p. 529.

The least that can be said is that this word is certainly not a particular description of any item of real property.

In the case of *Sasser v. U. S.*, 227 F.2d 359, the Court of Appeals for the Fifth Circuit sustained a search of a barn even though reference in search warrant was made to "other outbuildings." However, in sustaining this search, considerable emphasis was placed upon the fact that the description of the barn was definite and specific and only the barn was searched. We contend that the decision in the *Sasser* case would have been different if premises other than the barn had been searched.

The next ground stated for quashing the search warrant is that it does not direct for a search for property for which search warrants may issue under the provision of Rule 41 of the Federal Rules of Criminal Procedure.

In support of this contention, it will be noticed that the warrant directs for the search of "* * * non-taxpaid distilled spirits." Prior to July 1, 1958, the possession of non-taxpaid distilled spirits constituted an offense. At that time the statute was amended and it was provided that distilled spirits must have affixed thereto a stamp evidencing the *determination* of the tax. Therefore, the possession on non-taxpaid distilled spirits is not necessarily a crime.

Rule 41(b)(2) of the Federal Rules of Criminal Procedure provides that a search warrant may issue to search and seize property "designed or intended for use or which is or has been used as a means of committing a criminal offense"; or

(3) "possessed, controlled or designed or intended for use or which is or has been used in violation of Title 18, Sec. 957."

We respectfully submit that the bald allegation or direction for the search for non-taxpaid distilled spirits is not within the provision of Rule 41(b)(2).

The warrant further directs for the search and seizure of "property intended to be used in violation of Internal Revenue laws."

This is in violation of the Fourth Amendment to the Constitution of the United States, in that it does not particularly describe any property. It could have been a typewriter used to prepare a false income tax return, or the automobile used to carry the false return to the post office.

The warrant further, apparently, describes such property as being fit and intended for use in violation of Section 5601(a)(12), 5604 and 5686(a). The warrant does not say whether these sections are of the code of Alabama, Alaska, Pakistan or of any other code, much less the United States Code.

Webster's International Dictionary defines the word "similar" as follows: "(1) Nearly corresponding; resembling in many respects; somewhat like; having a general likeness * * * (3) Having the same shape, different only in size and position."

The proof showed that the officer taking the property under the warrant did not give to the person (Hooper) from whose premises the property was taken, a copy of the warrant and a receipt for the property taken as required by Rule 41(d) of the Federal Rules of Criminal Procedure. The proof showed further that the inventory was not made in his presence as provided by that rule. (Memorandum Opinion and Order, incorporated in Appendix at pp. A1-A7.)

It will further be noted that the trial judge obviously had grave doubts about the conduct and veracity of the particular agent involved by his finding that Mr. Childers made inconsistent statements under oath. (Memo-Opin-

ion, p. A3). Further, His Honor stated "Mr. Childers and his fellow officers approximated the outer limits of reasonableness in executing the warrant". (Memo-Opinion, p. A5).

It is petitioner's further contention that the totality of the circumstances heretofore described, coupled with the despicable conduct and questionable veracity of the officers, renders the search unreasonable under the 4th Amendment of the Constitution of the United States. *United States* v. *Rabinowitz*, (1950) 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653.

As to question two, having inadvertently failed to file a written motion to dismiss the indictment in this cause, at the trial of this cause on May 12, 1969, counsel raised the objection that the statutes underlying the indictment compel self-incrimination in violation of the Fifth Amendment to the Constitution of the United States. The trial court denied appellant Hooper's claim of self-incrimination. (Transcript of Evidence and Proceedings, pp. 7-9.)

In support of this proposition, appellant Hooper is relying upon the cases of *Marchetti* v. *U. S.*, *Grosso* v. *U. S.* and *Haynes* v. *U. S.*, with all of which this court is familiar.

Further, petitioner adopts as though set out here in full the fine dissenting opinion of Circuit Judge McCree, in *U. S.* v. *Roy Whitehead*, set out in the Appendix "C" at pp. A17-A26.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner,
Cleona Hooper

APPENDIX

APPENDIX A

MEMORANDUM OPINION AND ORDER

(Filed May 12, 1969)

The defendant, aggrieved by an allegedly unlawful search for and seizure of contraband whiskey by federal authorities herein, has moved to quash the search warrant and suppress for use as evidence against him the contraband thus obtained. Rule 41(e), Federal Rules of Criminal Procedure. No less than 13 grounds are listed by the defendant in support of this motion. The Court received evidence necessary to a decision on the motion, *idem.*, on April 21, 1969.

The Court finds and concludes that the warrant is sufficient on its face. It was not demonstrated by the defendant that anyone who followed the directions set forth in the warrant, would not therefrom have arrived at the premises authorized to be searched. This warrant describes with particularity the place to be searched and the things to be seized. *Berger* v. *New York* (1967), 388 U.S. 41, 58, 87 S.Ct. 1873, 19 L.Ed. 2d 1040, 1052 [14, 15]. It commanded a search at these premises for tax-unpaid distilled spirits and property fit and intended to be used in violation of 18 U.S.C. §§ 5601(a)(12), 5604, 5686(a). Rule 41(b)(2), Federal Rules of Criminal Procedure.

Further, there was probable cause for the commissioner to believe the existence of the grounds on which the warrant issued. Rule 41(e)(4), Federal Rules of Criminal Procedure. There is a legal presumption, which the movant has not overcome here, that the commissioner performed properly his duty. *United States* v. *Haskins*, C.A. 6th (1965), 345 F.2d 111, 112-113 [1, 2], affirming D.C. Tenn. (1962), 213 F.Supp. 551. The probability of criminal activity in progress on the defendant's premises

was shown the commissioner in the affidavit supporting his issuance of the warrant, and he was not confined in making his determination of probable cause by niggardly limitations or by restrictions on the use of his common sense. *Spinelli* v. *United States* (1969), ... U.S. ....., 88 S.Ct. ....., 21 L.Ed.2d 637, 645 [16].

The sole issue with the slightest vestige of merit raised by the multiplicity of protests by Mr. Hooper is that the warrant was executed illegally. Rule 41(e)(5), Federal Rules of Criminal Procedure. Mr. G. E. Childers, a special investigator of the alcohol, tobacco and firearms division in the federal Treasury Department, executed the warrant, assisted by several other trained investigators.

He testified that Mr. Hooper arrived at his home in a motor vehicle about the time the search began; that, because of some information received theretofore by the officers, the defendant was searched immediately as he alighted from his automobile, at a time when he had committed no offense in the presence of the officers and before he was placed in arrest; that he was advised that the search was being conducted by federal officers armed with a search warrant and was closely guarded during its progress; and that Mr. Hooper was given a copy of the search warrant but denied permission to leave the officers' custody to retrieve his eye-glasses, although the investigators advised Mr. Hooper his wife would be permitted to obtain his glasses.

Mr. Childers testified further that, after the searching had been completed, his superior Mr. Steve B. Whitlow made an inventory on the scene of the property there seized in the presence of both Messrs. Childers and Hooper, and that the defendant was given a receipt for the property seized on the back of the copy of the war-

rant with which he had been provided "* * * as soon as the property was seized. * * *" Although Mr. Childers denies having made a prior inconsistent statement in this connection, the Court finds that he had testified under oath before the hearing commissioner that Mr. Hooper was not given any receipt at the time of the search but was mailed a certified copy afterward.

The investigator testified that after the adjournment of the preliminary hearing herein, he and Mr. Whitlow were checking the inventory of the articles seized from Mr. Hooper, when Mr. Whitlow was required to depart. Mr. Childers said that Mr. Whitlow had listed on Mr. Hooper's copy of the search warrant a quantity of containers without specifying the respective numbers of jugs which were plastic and glass; and that he retrieved such copy from Mr. Hooper's shirt-pocket and, in the presence of the commissioner, obtained Mr. Hooper's permission to take the copy for the purpose of checking the accuracy of the articles listed thereon with Mr. Whitlow and to return it to Mr. Hooper by registered mail. Oddly, Mr. Childers undertook to explain the reason underlying his denial of his previous inconsistent statement by testifying Mr. Hooper was not given a receipt for the articles seized at the time of seizure, "* * * because I had gotten it back from him. * * *"

Mr. Whitlow testified that he prepared an inventory of the property seized from Mr. Hooper's premises at the scene of the raid on a scratch pad in the presence of both Messrs. Hooper and Childers; that he made no entry whatever on the copy of the warrant to be left with Mr. Hooper and gave him no receipt for the property seized at the scene of the raid; that he and Mr. Childers had commenced listing from his (Mr. Whitlow's) notes the items seized from Mr. Hooper's premises afterward at the com-

missioner's office, and when he departed, he left Mr. Childers in charge of completing this function; that he gave Mr. Hooper no receipt at any time; that he was not present when any listing of the seized articles was presented to Mr. Hooper; and that he was not present when Mr. Childers retrieved the warrant from Mr. Hooper's person.

The officers dispossessing Mr. Hooper of the property taken under this warrant were required to give Mr. Hooper a copy of the warrant and a receipt for the property taken at the scene of the raid. They were then required to make promptly a return of the warrant to the commissioner, accompanied by a written inventory of the property taken, made and verified in the presence of both Messrs. Hooper and Childers. Upon request of Mr. Hooper, the issuing commissioner was required to deliver a copy of the inventory to Mr. Hooper. Rule 41(d), Federal Rules of Criminal Procedure.

The failure of the seizing officers to comply with these requirements did not invalidate the reasonable search of Mr. Hooper's property, *Evans v. United States*, C.A. 6th (1957), 242 F.2d 534, 536 [5], certiorari denied (1957), 353 U.S. 976, 77 S.Ct. 1059, 1 L.Ed.2d 1137. A reasonable search had already been conducted and concluded before the occasion arose for the raiding officers to follow the foregoing procedures. This is not to be understood, however, as placing any sanction whatever on the evident discrepancies in the testimony of Mr. Childers nor the failure of Messrs. Childers and Whitlow to follow *strictly* the procedures of Rule 41(d), Federal Rules of Criminal Procedure.

The Fourth Amendment to our federal Constitution did not require these officers to delay execution of the search warrant for Mr. Hooper's premises, if a delay would have been reasonably calculated to endanger gravely their

lives or the lives of others. *Cf. Warden, Maryland Penitentiary* v. *Hayden* (1967), 387 U.S. 294, 298-299, 87 S.Ct. 1642, 18 L.Ed.2d 782, 787 [5]. At the same time, the fact that these persons were commissioned officers and armed with a warrant to enter upon Mr. Hooper's premises conferred on them no exemption from the mandates of the Constitution and laws of this nation or the established rules for proceeding in executing and returning the warrant. Courts which always have been, and must be, jealous of an individual citizen's right to privacy within the broad sweep of the Fourth Amendment, will not countenance searches and seizures which, under the total atmosphere of the case—the facts and circumstances presented by the evidence—are unreasonable. *United States* v. *Rabinowitz* (1950), 339 U.S. 56, 66, 70 S.Ct. 430, 94 L.Ed. 653, 660.

Mr. Childers and his fellow officers approximated the outer limits of reasonableness in executing this warrant. Their tactics impress this Court as being of a more strong-arm nature than warranted by the facts and circumstances. The officers were not authorized by the search warrant to search the person of Mr. Hooper. They had information that he was committing a felony on his premises and could have arrested him on the basis of that information, but they did not arrest him on that basis. There appears to have been no authority here for the officers to have arrested Mr. Hooper and search his person until after contraband had been discovered on his premises.

The restraint of Mr. Hooper and restriction of his liberty of movement constituted an arrest, *United States* v. *Souther*, D.C. Tenn. (1962), 211 F.Supp. 848, 851, but not a lawful arrest justifying a search of Mr. Hooper's person

as an incident thereto. *Parker* v. *State* (1941), 170 Tenn.* 380, 383-384 (1), (2), 150 S.W.2d 725. Several strong and youthful officers participated in this raid. If they had previous information that Mr. Hooper would be armed, it seems that the investigators so closely guarding Mr. Hooper could have intervened physically, if it became necessary, to prevent Mr. Hooper's either interfering with the conduct of the search or harming anyone in the raiding party.

Plainly there was no reason for the investigators not to serve the warrant on Mr. Hooper by reading it to him before commencing their search. The contraband appears to have been so situated that it was not apt to be destroyed or spirited-away quickly. And, although standing alone, the following incident might not be censurable, under the total atmosphere surrounding this case, the attitude of Mr. Childers in, admittedly, physically retrieving Mr. Hooper's copy of the warrant from his pocket is condemned. Asking the defendant to re-deliver it to him was Mr. Childers' proper course.

More seriously, however, the Court is disturbed concerning the gap demonstrated in Mr. Childers' credibility as a witness. He testified under oath before this Court that Mr. Hooper was given "* * * an entire receipt * * *" on the back of his copy of the warrant "* * * as soon as the property was seized. * * *" He denies having testified earlier, also under oath, before the commissioner that no receipt was given Mr. Hooper at the time of the search, but that a certified copy of it was mailed to Mr. Hooper afterward. The weight to be accorded his denial of this

*In the absence of controlling federal standards, the lawfulness of this search is determined by the law of Tennessee. *United States* v. *Williams*, C. A. 6th (1965), 351 F. 2d 475, 477 [2], where a precautionary search of a narcotic violater's person for weapons, after (apparently) discovery of contraband on his premises, was approved.

self-contradiction is lightened virtually to nothingness by the sworn testimony of Mr. Whitlow, whose credibility as a witness is not in issue, to the effect that Mr. Hooper was given no receipt and no entries were made on his copy of the warrant from Mr. Whitlow's inventory at the scene of the raid. Zealousness in law enforcement is commended, but unbridled zeal can lead him into paths of unrighteousness!

Nonetheless, in totality the search and seizure herein were not unreasonable, and the defendant's motion to suppress evidence of the contraband seized from him on his premises hereby is

DENIED.

ENTER:

/s/ C. G. Neese
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CLEONA HOOPER, Defendant-Appellant.	No. 20,205

ORDER

(Filed July 2, 1970)

Before: McCREE and BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

Following a jury trial the defendant-appellant appeals from his conviction of violating the Internal Revenue

Laws (Title 26 U.S.C. §§ 5686 [a] and 5601 [a][12]). He contends the laws upon which the indictment was based are unconstitutional, but this was decided adversely to his contention in United States v. Whitehead, ... F.2d ..... (6th Cir. 1970). His other contention that a search warrant was improperly executed is also without merit.

Affirmed.

Entered by order of the Court
/s/ Carl W. Reuss
Clerk

APPENDIX C

No. 18607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROY WHITEHEAD, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided March 3, 1970.

Before: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, MCCREE, COMBS, BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

EDWARDS, Circuit Judge. This appeal presents constitutional issues upon which panels of this court have been divided. It was selected by the court *sua sponte* for in banc consideration. It was reargued before the entire bench in the December 1969 term of the court. The fundamental question presented is whether the Fifth Amend-

ment bars appellant's conviction on an indictment charging violations of the federal alcohol tax laws. We hold that it does not.

Appellant was convicted on seven counts of an eight-count indictment and sentenced to concurrent terms totaling four years. The counts charged appellant with possession, custody and control of a still, the making of mash, the transportation of raw materials to an unlawful distillery, and the possession of distilled spirits, all in violation of the federal tax laws.[1]

The record discloses extensive surveillance of the house in Detroit, Michigan, where ultimately the still and 800 gallons of mash were found. Appellant was seen going into the house carrying 60-pound sacks of sugar and coming out with paper bags containing something heavy and loading same in cars. Two such cars were stopped by Internal Revenue agents. Appellant, who was driving one of them, was arrested. Both cars were found to be loaded with nontax-paid whiskey. Thereupon a search warrant was procured for the house, the still was found, and appellant was indicted.

Appellant contends that the evidence was insufficient to sustain conviction on several counts, including Count 6 pertaining to the making of mash. He also contends that various provisions of the federal tax laws violated his Amendment rights under Supreme Court decisions in the *Marchetti*,[2] *Grosso*,[3] and *Haynes*[4] cases.

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1. 26 U.S.C. §§ 5173(a), 5601(a)(4), 5205(a)(2), 5179(a), 5601(a)(1), 5222(a)(1), 5601(a)(7), 5178(a)(1)(B), 5601(a)(6), 5180(a), 5681(c) (1964).

2. *Marchetti* v. *United States*, 390 U.S. 39 (1968).

3. *Grosso* v. *United States*, 390 U.S. 62 (1968).

4. *Haynes* v. *United States*, 390 U.S. 85 (1968).

We believe that the evidence of appellant's activity in and about the premises were acts which represented much more than presence at the site of a still (*see United States* v. *Romano*, 382 U.S. 136 (1965)) or assistance in only one phase of an illegal liquor business (*see Bozza* v. *United States*, 330 U.S. 160 (1947)). Appellant was seen engaged in activities from which the jury could have inferred that he was carrying supplies for illegal manufacture of liquor into a house and carrying the illegal liquor out. He was arrested while driving an automobile which contained illicit whiskey which the jury had every right to infer was a product of an illegal still operated by appellant.

As to the count which alleged illegal manufacture of mash, appellant was seen carrying heavy bags of sugar into the house where subsequently the still and some distilled liquor were found. The sugar bags were found empty in a closet in the house. Eight hundred gallons of mash were also found there.

All in all, there was both direct and circumstantial evidence from which the jury could have inferred appellant's guilt on all counts beyond a reasonable doubt. *Ramsey* v. *United States*, 248 F.2d 740 (6th Cir. 1957); *Chadwell* v. *United States*, 260 F.2d 257 (6th Cir. 1958).

Turning to the constitutional issue, we note that appellant herein did not seek to raise the Fifth Amendment privilege at trial. Nonetheless, we do not consider the privilege to have been waived in this case and we elect to decide this issue on its merits. *See Grosso* v. *United States*, 390 U.S. 62, 63, 70, 71, (1968); *Drennon* v. *United States*, 393 F.2d 342 (8th Cir. 1968); *Greenwood* v. *United States*, 392 F.2d 558 (4th Cir. 1968); *United States* v. *Manfredonia*, 391 F.2d 229 (2d Cir. 1968); *Harris* v. *United States*, 390 F.2d 616 (8th Cir. 1968); *but see Howard* v. *United States*, 397 F.2d 72 (9th Cir. 1968).

We are urged to hold these tax measures unconstitutional in that they require the performance of certain affirmative acts; here, the posting of a sign at the site of a lawful distillery, the furnishing of bond, the purchase and affixing of tax stamps and the filing of registration information. Appellant asserts that these affirmative acts might create for some prospective taxpayers in some possible situations "hazards of incrimination . . . [which] are not trifling or imaginary." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968).

At the outset we emphasize that we do not read these words as having been written as a litmus paper test of constitutionality. It is "compelled" self-incrimination against which the Fifth Amendment has been held to offer protection. Every criminal act, no matter how voluntary, creates some real hazard of incrimination. And where regulatory legislation provides penalties for failure to perform certain acts normally the Fifth Amendment does not apply because the omission is not deemed "compelled."

We do not think that the Supreme Court has as yet provided a wholly clear rationale for distinguishing constitutional exercise of taxing and regulatory powers from those situations wherein fatal Fifth Amendment conflicts are to be found. In such a situation we would proceed with some caution and with strict construction of the case holdings if the issue involved appeared to be in doubt. In our instant case, however, we believe there is no reason for doubt.

There are clear and important distinctions between the currently disputed provisions of alcohol tax statutes and those statutory provisions which were held vulnerable to attack on Fifth Amendment grounds in the *Marchetti*, *Grosso* and *Haynes* cases. (*See also Leary* v. *United States*, 395 U.S. 6 (1969)).

Underlying the series of cases to which we have referred is the Supreme Court's holding in *Albertson* v. *SACB*, 382 U.S. 70 (1965). The Supreme Court there distinguished between the *Sullivan* case (*United States* v. *Sullivan*, 274 U.S. 259 (1927)) which upheld as constitutional the requirement of filing an income tax return, and an order requiring a Communist to register as such and thus furnish evidence of his violation of two federal criminal statutes.

In *Albertson* the Supreme Court said:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Albertson* v. *SACB*, *supra* at 79.

The Public Purpose

The alcohol tax laws are "essentially noncriminal" revenue measures. Until the Sixteenth Amendment to the United States Constitution (income tax), taxes on alcoholic beverages provided the fundamental financing of the United States government.

Even after enactment of the federal income tax, the alcohol tax laws constitute substantial revenue producing measures.

As the Fourth Circuit has noted:

> "In 1966, the taxes on distilled spirits produced $3.7 billion in internal revenue. The wagering tax

scrutinized in *Marchetti* produced 'in the past several years' only $115 million. 390 U.S. at 82, 88 S.Ct. at 721.

"We think the failure of these defendants to designate place of manufacture and to post a distillery bond is due to their wish to avoid the federal tax of $10.50 per gallon on distilled spirits. The evasion of tax alone provides the enormous margin of profit in the white whiskey business and accounts for the delinquency here. It lies well within the power of Congress to exercise a regulatory function to enforce the collection of such lawfully due taxes." *United States* v. *Walden*, 411 F.2d 1109, 1112 (4th Cir. 1969). (Footnote omitted.)

In a preprohibition case, the United States Supreme Court provided this description of the alcohol tax laws of that day — a description which we feel entirely appropriate to describe the statute currently under attack:

"It is clear, even upon a cursory reading, that the well-considered and minute provisions of the Revised Statutes found in chapter 4, entitled 'Distilled Spirits,' of Title XXXV., entitled 'Internal Revenue,' were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits.

"All the regulations for the manufacture and storage, the marking, branding, numbering, and stamping with tax stamps, of distilled spirits, and all the penalties, forfeitures, fines, and imprisonments prescribed by the chapter mentioned, have that end only in view. If the tax on distilled spirits were repealed, all the ingenious and complicated provisions of the chapter would become useless and insensible." *United States* v. *Ulrici*, 111 U.S. 38, 40 (1884).

Returning to the language of *Albertson*, the statutory provisions here attacked are "neutral on their face and directed at the public at large." The manufacture of alcoholic beverages is lawful under some circumstances in all 50

states and the District of Columbia and the taxes are collected from thousands of persons engaged in lawful sale and distribution of these products.

The Fifth Circuit has expressed this view in a case upon which the Supreme Court has already denied certiorari:

> "Perhaps if this prosecution had occurred under an appropriate statute that existed during the short life of the Eighteenth Amendment to the United States Constitution, appellants could properly equate their situation to the appellants in Marchetti. As it is, however, we are informed by the government's brief, and it is not disputed, (a matter of which we can take judicial notice) that possession of distilled spirits is legal to some extent in every one of the fifty states of the union. Therefore, we find ourselves in agreement with those district courts in addition to the trial court here, which have held that there is no danger of self incrimination resulting from the requirement of Sections 5205(a)(2) and 5604(a)(1) relating to the placing of stamps and taxing of distilled spirits." *Brown* v. *United States*, 401 F.2d 769, 770 (5th Cir 1968), *cert. denied*, 394 U.S. 962 (1969).

The Effect on the Individual

Regardless, however, of what we have written thus far pertaining to the purpose of the alcohol tax laws, appellant would argue that the Fifth Amendment privilege depends upon no such balancing of rights and is absolute as to him. We cannot perceive, however, how the affirmative acts here objected to can be held to represent compelling this appellant "in any criminal case to be a witness against himself." U. S. Const. amend. V. Contrary to the facts in the *Albertson* case, these statutory provisions are not aimed at exposing "a highly selective group inherently suspect of criminal activities" to prosecution under other criminal stat-

utes. Nor do we find here a compelled response which might involve "the admission of a crucial element of a crime."

These statutes do apply generally to all who manufacture liquor, including many persons or organizations who do so entirely lawfully within the State of Michigan. We find here no purpose to aid state officialdom in suppressing activities generally rendered illegal by state law. *Cf. Marchetti* v. *United States, supra*; *Grosso* v. *United States, supra*.

We certainly do not find here that "Congress intended information obtained as a consequence of [the requirements of these statutes] to be provided to interested prosecuting authorities." *Marchetti* v. *United States, supra* at 58, 59.

Nor do we find that these statutes have "an obvious purpose . . . to coerce evidence from persons engaged in illegal activities for use in their prosecution." *Grosso* v. *United States, supra* at 74 (concurring opinion).

Indeed, the alcohol tax statutes were drafted with the purpose of keeping persons of ill-repute out of the alcohol beverage manufacturing business. *Seaway Beverages, Inc.* v. *Dillon*, 319 F.2d 722 (D.C. Cir.), *cert. denied*, 375 U.S. 923 (1963). And these federal statutes — in place of seeking to expose a limited class of law violators to state prosecution (*Cf. Marchetti, Grosso* and *Haynes*) — prohibit issuance of a basic permit upon a finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C) (1964).

Absent the prior securing of the basic permit on a showing of compliance with state law, it is greatly to be doubted that any other of the affirmative acts required as a prerequisite to legal manufacture of alcoholic beverages under fed-

eral law (*i.e.*, posting of bond, securing and posting of a distillery sign, securing and affixing of tax stamps) could actually be performed.

For example, Title 27 §203 makes it unlawful to manufacture, ship or sell any distilled spirits, except pursuant to the basic permit referred to above. And appellant in this case (if we hypothesize his ability to show compliance with state law) could not have received such a basic permit to manufacture distilled spirits on the premises involved in this case because 26 U.S.C. §5178 flatly prohibits such a plant "in any dwelling house."

The possibility of appellant's self-incrimination by dint of actual compliance with the statutory provisions attacked herein is considerably less than "purely hypothetical." *Cf. Minor* v. *United States*, —— U.S. (1969). (Decided Dec. 8, 1969, Slip op. p. 10).

In summary, the statutory provisions attacked in this appeal are a far cry from the statutory provisions invalidated in *Marchetti*, *Grosso* and *Haynes* which the Supreme Court held deliberately sought to expose federal registrants to state prosecution. Here federal registration is prohibited unless the registrant is in compliance with state law. This appellant could not, if he had tried, have gotten his name on any list of federal registrants because that list was a list of lawful distillers under both state and federal laws and not as in *Marchetti* and *Grosso* a list of gamblers whose activities were illegal under state law. Judge McCree's dissent suggests that appellant might have "attempted" registration and in effect told the federal authorities of his intention to make white whiskey in residential premises. Since there would have been no conceivable federal statutory benefit from such a disclosure, we cannot perceive how it could be deemed "compelled" in any Fifth Amendment sense.

We find no abuse of appellant's Fifth Amendment rights.

While this is a case of first impression in this court, we are by no means plowing new ground in the federal law. Three circuits and many District Courts have already reached the same conclusion. *United States* v. *Fricano*, 416 F.2d 434 (2d Cir. 1969); *United States* v. *Walden*, 411 F.2d 1109 (4th Cir. 1969); *Wilson* v. *United States*, 409 F.2d 604 (5th Cir.), *cert. denied*, 395 U.S. 923 (1969); *Thornburg* v. *United States*, 406 F.2d 1060 (5th Cir. 1969); *Grant* v. *United States*, 407 F.2d 56 (5th Cir. 1969); *Hall* v. *United States*, 407 F.2d 1320 (5th Cir. 1969); *United States* v. *Ellington*, 406 F.2d 348 (5th Cir. 1969); *Shoffeitt* v. *United States*, 403 F.2d 991 (5th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969); *Anderson* v. *United States*, 403 F.2d 206 (5th Cir. 1968); *Brown* v. *United States*, 401 F.2d 769 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969); *United States* v. *Young*, 284 F. Supp. 1008 (E.D. Tenn. 1968); *United States* v. *Richardson*, 284 F. Supp. 419 (M.D. Ala. 1968); *United States* v. *McGee*, 282 F. Supp. 550 (M.D. Tenn. 1968). *Contra, United States* v. *Fine*, 293 F. Supp. 189 (E.D. Tenn. 1968).

The judgment of the District Court is affirmed.

McCREE, Circuit Judge (dissenting in part). I would affirm appellant's conviction on count 6 for making and fermenting mash on premises not lawfully qualified for the production of distilled spirits in violation of 26 U.S.C. §§ 5222(a)(1) and 5601(a)(7) and on count 7 for aiding and assisting in the use of a still for the production of distilled spirits in a dwelling house in violation of 26 U.S.C. §§ 5178(a)(1)(B) and 5601(a)(6). Appellant's only objection to his convictions on these counts is directed to the sufficiency of the evidence to uphold these convictions, and I agree that the evidence is sufficient to uphold them.

I would, however, reverse appellant's convictions on count 1 for carrying on the business of a distiller without giving bond in violation of 26 U.S.C. §§ 5173(a) and 5601(a)(4); on counts 3 and 4 for possessing and transporting distilled spirits in containers not having affixed thereto the required venue stamps in violations of 26 U.S.C. §§ 5205(a)(2) and 5604(a)(1); on count 5 for possessing an unregistered still in violation of 26 U.S.C. §§ 5179(a) and 5601(a)(1); and on count 8 for carrying and delivering raw materials to an unlawful distillery at which no sign was posted in violation of 26 U.S.C. §§ 5180(a) and 5681(c). I would reach this result because appellant's refusal to comply with the statutory requirements upon which these convictions are based was a proper exercise of his fifth amendment privilege against self-incrimination and therefore he may not be criminally punished for his failure to comply. *See Marchetti v. United States*, 390 U.S. 39, 61 (1968).

The fifth amendment provides, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In a series of recent decisions involving the relationship between this privilege and the Government's right to require a person, upon threat of criminal prosecution, to provide potentially incriminating information, the Supreme Court has decided that "The *central standard* for the privilege's application [is] whether the claimant is confronted by substantial and [illegible] merely [illegible] of imaginary, hazards of incrimination." *Marchetti v. United States, supra* at 53 (emphasis added). *Accord, Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Leary v. United States*, 395 U.S. 6 (1969). If the obligation to provide information creates " 'real and appreciable', and not merely 'imaginary and unsubstantial,' hazards of self-incrimination," a person cannot be criminally

punished for refusing to comply. *Marchetti* v. *United States*, *supra* at 48.

At the outset, it should be observed that this standard renders inapposite one of the factors relied on by the majority to distinguish *Marchetti*, *Grosso*, *Haynes* and *Leary* from the present case. For example, the majority points out that the alcohol tax laws are "essentially non-criminal revenue measures" and that the purpose of the disclosure provisions is to facilitate securing the payment of the taxes imposed and not to aid law enforcement officials in their efforts against illegal manufacturers of distilled spirits. However, regardless of the Congressional purpose for inclusion of the disclosure provisions in the alcohol tax laws, the refusal to comply with these provisions cannot be criminally punished if compliance would create substantial and real hazards of self-incrimination. *See generally Counselman* v. *Hitchcok*, 142 U.S. 547, 585 (1892).[1] The question before us, then, is whether appellant ". . . may be compelled to give evidence against himself." *Marchetti* v. *United States*, *supra* at 51.

Considering the substantiality of the risk of self-incrimination if appellant complied with the disclosure provisions of the alcohol tax laws, the majority concludes that the degree of risk involved is "considerably less than 'purely hypothetical'" (1) because the disclosure provisions are "directed at the public at large, and not at a highly selective group inherently suspect of criminal activities", *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965), and (2) because it is doubtful, in any event, whether appellant would ever have the opportunity to perform the affirmative acts of disclosure.

1. It is interesting to speculate on the effect on the privilege against self-incrimination of a doctrine which would permit infringement of the privilege if occasioned by a legitimate Congressional purpose, since the suppression of criminal activity, in certain areas, would be a legitimate Congressional purpose.

Admittedly, compliance with a statutory provision requiring the disclosure of illegal activity creates a greater risk of self-incrimination when the disclosure requirement is directed at a "group inherently suspect of criminal activities," since it identifies the discloser as a member of the suspect group. *Leary* v. *United States, supra* at 18. *See also Marchetti* v. *United States, supra* at 57; *Grosso* v. *United States, supra* at 68. However, the character of the group subject to a disclosure requirement certainly is not by itself determinative of the substantiality of the risk of self-incrimination attendant on compliance with such a requirement. Even if the requirement is not directed at an inherently suspect group, the risk encountered as a consequence of compliance may still be "real and appreciable".

Indeed, manufacturers of distilled spirits are a prime example of this. Although distillers may not be a "group inherently suspect of criminal activities," they are involved in a business which is subject to extensive state and federal controls. In Michigan, the liquor industry is an area permeated with statutory requirements, the violation of which can be criminally punished. *See, e.g.*, Mich. Comp. Laws §§ 436.1, 436.2, 436.17, 436.19, 436.22, 436.32, 436.50. Moreover, at the time appellant was engaged in the illegal manufacture of distilled spirits, there was a statutory requirement that certain internal revenue offices maintain a list of persons who had paid the special taxes assessed on the manufacture of distilled spirits and that this list be furnished to any prosecuting officer of any state, county, or municipality upon request. 26 U.S.C. § 6107.[2] There

2. This provision was repealed, effective December 16, 1968, by Section 203 (a), Title II of the Gun Control Act of 1968, Pub. L. No. 90-618, 1968 U.S. Code Cong. & Adm. News 1423, but this does not affect the relevance of section 6107 to the substantiality of the risk of self-incrimination confronting appellant at the time of his illegal activity. *See Albertson* v. *SACB*, 382 U.S. 70, 77 (1965). Furthermore, although the internal revenue service is no longer required to compile a list of persons who pay the special alcohol taxes and to furnish this list to prosecuting officials, "neither has

is therefore sufficient attention focused on manufacturers of distilled spirits to indicate that the hazards of self-incrimination attendant on compliance with the disclosure provisions of the alcohol tax laws would be more than "merely trifling or imaginary."

The important inquiry then is whether, in reality, these hazards ever would materialize. *Cf. Leary* v. *United States,* 395 U.S. 6 (1969); *Buie* v. *United States,* No. 271 (U.S., Dec. 8, 1969); *Minor* v. *United States,* No. 189 (U.S., Dec. 8, 1969). The majority concludes that this is "greatly to be doubted" because a prerequisite to compliance with the disclosure provisions of the alcohol tax laws is the securing of a basic permit, 27 U.S.C. § 203(b)(1), and the Secretary of the Treasury is prohibited from issuing a basic permit when "the operations proposed to be conducted . . . are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C).

The effect on the privilege against self-incrimination of practical barriers to actual compliance with provisions requiring disclosure of illegal activity depends on the nature of the barriers. In *Leary* v. *United States, supra,* the Government contended that there was no substantial risk of self-incrimination because one who intended unlawfully to purchase marihuana would know he could not obtain the order form which contained the incriminating questions and consequently never would apply for it. The Government also contended that even if the buyer did apply for an order form, it was doubtful that the unsuccessful application would be revealed to law enforcement officials. *Id.* at 18-20. The Supreme Court rejected both of these con-

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Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax." *Grosso* v. *United States,* 390 U.S. at 66. *See Marchetti* v. *United States,* 390 U.S. at 60, n. 18.

tentions and concluded that "real and appreciable" hazards of self-incrimination did confront Leary because the Congressional intent, as revealed by the statutory scheme adopted, was that an unlawful purchaser of marihuana should be able to obtain an order form.

On the other hand, in *Buie* v. *United States*, *supra*, the Court decided that the practical barriers encountered by one who unlawfully sold marihuana were sufficiently insurmountable to preclude any real possibility that he actually would comply with the order form requirements and thereby incriminate himself. Indeed, it was the Court's earlier decision in *Leary* that reduced the hazards of self-incrimination to the point where they were "imaginary and unsubstantial" as far as the seller was concerned because its decision relieved the purchaser of marihuana of his obligation of obtaining the order form and of providing the seller with an opportunity to comply with its requirements and thereby incriminate himself. *Buie* v. *United States*, *supra* at 2 - 4 of slip. op.

The practical barriers to compliance confronted by appellant in the instant case are not as arfificial as those in *Leary*, but neither are they as substantial as those in *Buie*. Although a basic permit is a prerequisite to the lawful manufacture of distilled spirits, the absence of such a permit might not preclude appellant from complying with the provision requiring him to post a sign at the site of the still. 26 U.S.C. § 5180(a). Under the terms of the statute and the regulation adopted pursuant thereto, appellant apparently could have complied with this requirement merely by fabricating a sign containing the required information and installing it. *See* 26 C.F.R. § 201.235. Since "a sign placed conspicuously on the outside front or entrance [of the still] and exhibiting in readily legible and durable characters (a) the real name of the proprietor, (b) the

plant number, and (c) the designation of the kind of business", 26 C.F.R. § 201.235, would disclose the operation of the still, I think the hazards of incrimination attendant on compliance with 26 U.S.C. § 5180(a) are "real and appreciable". Accordingly, I would hold that appellant cannot be criminally punished for his failure to comply with this statutory provision.

The necessity of a basic permit and the prohibition on its issuance if the proposed operation violates the laws of the state probably would foreclose "literal and full compliance" with the statutory provisions requiring appellant to register the still and to file a qualification bond. 26 U.S.C. §§ 5179(a), 5173(a). However, the basic permit requirement would not prevent appellant from *attempting* to comply with the registration and qualification bond provisions by submitting an application. There is no statutory requirement that a distiller obtain a basic permit prior to filing an application for registration and a qualification bond.[3] Also, pursuant to 26 U.S.C. § 5171(a), "Every person *shall, before commencing* or continuing the business of a distiller . . . make application" for the registration of his still. (Emphasis added). Accordingly, under the statutory scheme adopted by Congress, a distiller can file the registration form and qualification bond simultaneously with his request for a basic permit. Moreover, the likelihood that a distiller would do this is increased by the fact that he can lawfully obtain distilling apparatus prior to securing a basic permit.

Similarly, appellant also would not be precluded from *attempting* to procure the revenue stamps which must be affixed to containers of distilled spirits. 26 U.S.C. § 5205 (a) (2). Again, the likelihood of "literal and full compli-

3. The qualification bond is filed at the same time as the application for registration, 26 U.S.C. § 5173(a).

ance" is small, since the purpose of the stamps is to evidence compliance with the provisions of the alcohol tax laws. However, in determining whether appellant would attempt to comply with this requirement, and with those imposed by sections 5179(a) and 5173(a), I doubt that we are permitted to speculate that, in reality, he would not attempt to obey the law. Implicit in the Supreme Court's decision in *Leary* is the notion that regardless of whether, in reality, one who purchases marihuana illegally would attempt to obtain an order form, the Court, in analyzing the substantiality of the risks of self-incrimination, would assume that this was a realistic alternative for the purchaser.[4]

Therefore, even with regard to the registration, qualification bond, and revenue stamp requirements, the hazards of self-incrimination confronting appellant were greater than those confronting Buie. In *Buie*, the Court concluded that the seller would never have an opportunity to complete the order form and disclose his illegal activity.[5] Appellant, on the other hand, by attempting to comply with the requirements of 26 U.S.C. §§ 5170(a), 5173(a) and 5205(a)

4. If the Court had not made this assumption, the substantiality of the risks of incrimination confronting Leary would have been no greater than those confronting Buie. In other words, if the Court took judicial notice of the fact that illegal purchasers of marihuana do not, in reality, attempt to comply with the requirement of obtaining an order form, the risks of self-incrimination confronting Leary would have been minimal. Accordingly, the significant distinction between *Leary* and *Buie* would seem to be that Leary could have attempted to obtain an order form and incriminate himself whereas Buie could not, since the obligation to procure the order form is on the purchaser. *See* 26 U.S.C. §§ 4705(a), 4742(a). In the present case, the various obligations imposed by the statutory provisions in question are on the distiller.

5. In *Buie*, the Court also observed that the statutory obligation to furnish the information requested on the order form was on the buyer and that this may eliminate the problem of "self-incrimination", as that term is ordinarily understood. In the present case it is the distiller himself who is obligated to disclose his activities.

(2), would reveal his intention to engage in the manufacture of distilled spirits.[6]

Of course, whether the potentially incriminating information provided by the attempt to comply would, in reality, ever be used by law enforcement officials to forge a " 'link in the chain' of evidence tending to establish his guilt," *Marchetti* v. *United States, supra* at 48, and thus, whether the hazards of incrimination involved in such an attempt are "real and appreciable", involves some conjecture. The court has before it no factual data indicating the likelihood that the information contained in unsuccessful applications to register, to post the qualification bond, and to obtain revenue stamps is passed on to other law enforcement officials. However, in the absence of such data, I would resolve the doubts in favor of the applicability of the Constitutoinal privilege.

Until recently, an exchange of information between treasury officials and prosecuting officers of states, counties, and municipalities with regard to persons paying the special taxes assessed on the manufacture of distilled spirits was mandated by 26 U.S.C. § 6107. Thus, the channels of communication have been established. Moreover, although 26 U.S.C. § 6107 has been repealed, *see* n. 2, *supra*, there are still no restrictions imposed upon the use of the potentially incriminating information contained in

6. The fact that appellant would be revealing an intention to violate the law at some future time may reduce the substantiality of the risks of self-incrimination, but it would not make these risks trifling or imaginary. "We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence . . . , [A]lthough prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968), overruling *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955).

an application for registration or a qualification bond form. *See Grosso* v. *United States*, 390 U.S. at 66.

It is also relevant that "other methods, entirely consistent with constitutional limitations," *Haynes* v. *United States*, 390 U.S. at 98, could be employed to obtain the information provided by compliance with the statutory provisions in question. *See generally Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). *See also Adams* v. *Maryland*, 347 U.S. 179 (1954); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Thus, permitting appellant to invoke the privilege against self-incrimination in order to prevent criminal prosecution for failing to comply with these provisions would not "prevent the effective regulation or taxation by Congress" of distilled spirits. *Haynes* v. *United States*, *supra* at 98.

Accordingly, I would hold that sections 5170(a), 5173 (a) and 5205(a) (2),[7] as well as section 5180(a), compelled appellant, upon threat of criminal punishment, to disclose his illegal activities and that the hazards of self-incrimination which would have resulted from disclosure were "real and appreciable". I would therefore reverse his convictions on counts one, three, four, five and eight.

Combs, Circuit Judge. I concur in Judge McCree's dissent. I am unable to find within the rule of *Marchetti* any distinction between "moonshiners" and members of "the syndicate."

O'Sullivan, Senior Circuit Judge. I concur in Judge McCree's dissent. I do so because I believe that his opin-

7. The fact that counts 3 and 4 are directed at appellant's possession and transportation of unstamped containers, and not at his failure to obtain revenue stamps *per se*, is irrelevant, since the effect of 26 U.S.C. § 5205(a)(2) is to require a distiller to obtain revenue stamps in order to lawfully possess and transport distilled spirits in containers. *See Haynes* v. *United States*, 390 U.S. 85, 90-95 (1968).

ion is more consistent with *Marchetti* v. *United States*, 390 U.S. 39 (1968) than the carefully prepared opinion of Judge Edwards. I believe that, whether operating in Michigan, Tennessee, or elsewhere, "moonshiners" make up a "group inherently suspect of criminal activities" just as much as the "big time" gamblers who enjoy the protection of *Marchetti*. Emphasis is placed upon the fact that the alcohol tax laws are "essentially non-criminal". This is so, it is argued, because such laws exist primarily to raise revenue. Such laws do, however, provide *criminal* sanction for their violation and in most states, while the manufacture of distilled spirits is not totally forbidden, the activity for which this defendant was convicted—"moonshining"—is criminal activity wherever it is carried on.

Distinction is asserted to exist because the statute involved in *Marchetti* was purposely passed by Congress to interrupt criminal conduct—"big time" gambling carried on, in part at least, by "the syndicate", a part of organized crime. It is argued that Congress cannot impair the Fifth Amendment rights of those so engaged, but may forbid use of the Fifth Amendment by those who choose to violate the revenue laws relating to distilled spirits. The "moonshiner" has been as effectively deprived of the protection of the Fifth Amendment when he is convicted for failure to announce his intention to engage in criminal activity as is the interstate gambler, convicted for failure to register and disclose his intention to engage in crime. I am unable to discern legitimacy in the nuances employed to find distinction between the "moonshiner" and members of "the syndicate". So long as *Marchetti* is the law, it should be followed without discrimination.

APPENDIX D

INDICTMENT

(Filed March 4, 1969)

First Count

The Grand Jury charges that on or about the 15th day of December, 1968, in the Eastern District of Tennessee, Northeastern Division, CLEONA HOOPER had or possessed property, to wit: 82 cases of one-half gallon glass jars, 66 one-gallon jugs, plastic and glass, one 200-gallon mixing vat, double felt filter, 20-gallon wash tub, and 91 pints of Isopropyl alcohol, said property intended for use in violating the provisions of the Internal Revenue laws of the United States. (Title 26, Section 5686(a), U.S.C.)

Second Count

The Grand Jury further charges that on or about the 15th day of December, 1968, in the Eastern District of Tennessee, Northeastern Division, CLEONA HOOPER wilfully and knowingly, and otherwise than as authorized by law, did conceal a quantity of distilled spirits, that is, 111 gallons of distilled spirits contained in a five-gallon plastic container, one-gallon jugs, one-half gallon jugs, and pint bottles, from the place where the same was manufactured, the tax on said spirits having not been paid or determined, as CLEONA HOOPER then well knew. (Title 26, Section 5601(a)(12), U.S.C.)

.....

United States Attorney

A True Bill:

.....

Foreman

APPENDIX E

MOTION TO QUASH SEARCH WARRANT AND SUPPRESS TESTIMONY

(Filed April 21, 1969)

Comes the defendant, Cleona Hooper, and moves the court for an order quashing a search warrant issued by Kyle K. King, United States Commissioner, on December 13, 1968, and suppressing the testimony of G. E. Childers of the Alcohol and Tobacco Tax Division and any other Federal or State officers who may have participated in a search of the defendant's home and effects on December 15, 1968.

The reasons for this motion are as follows:

1. That the warrant of search is a general warrant in that it does not direct for the search of particularly described property.

2. The warrant does not direct for a search for property for which search warrants may issue under the provisions of Rule 41 of the Federal Rules of Criminal Procedure and the laws of the United States relating to search and seizure.

3. That the Commissioner abused his discretion by issuing the warrant of search upon the affidavit presented by G. E. Childers.

4. The affidavit does not consist of facts, but conclusions of the affiant stated in the nature of facts.

5. The property searched is not the property described in the warrant.

6. That the property searched is not particularly described as commanded by the Fourth Amendment.

7. That the warrant is insufficient on its face.

8. That there was not probable cause for believing the existence of the grounds on which the warrant was issued.

9. The warrant was illegally executed.

10. The affidavit of Agent Childers is partly false.

11. The officer taking property under the warrant did not give to the person from whose premises the property was taken a copy of the warrant and a receipt for the property taken, nor did he leave a copy of the receipt at the place from which the property was taken.

12. The officer executing the warrant did not make an inventory of the property taken in the presence of the person from whose possession or premises said property was taken although such person was present.

13. That the removal of plastic jugs and boxes or cases from the place on the 8th day of December, 1968, does not tend to show that contraband or other property which may be the object of a search is stored on the premises on the 13th or 15th day of December, 1968.

The affidavit of Cleona Hooper is attached hereto in support of this motion.

WHEREFORE, the defendant prays for an order quashing the search warrant and suppressing the testimony of Agent Childers or any other agent insofar as said testimony may pertain to 111 gallons of distilled spirits, a metal vat, filter, washtub, a number of glass and plastic jugs, a quantity of alcohol, and twenty-two pounds of yeast.

Respectfully submitted,

Dale Quillen
Ben W. Hooper
Attorneys for Defendant

APPENDIX F

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS TESTIMONY

STATE OF TENNESSEE
COUNTY OF

Cleona Hooper being duly sworn, deposes and says:

That he resides on the premises searched by agents of the Alcohol and Tobacco Tax Division on the 15th day of December, 1968. in Cosby, Tennessee. That the officers conducted a search of his person and premises without affording him an opportunity to examine the warrant of search. That he was arrested by said officers unlawfully and was detained in custody before the officers commenced their search.

The deponent further says that he has examined a copy of the affidavit in support of the search warrant which was made by G. E. Childers on the 13th day of December, 1968 and that said affidavit is false in that portion which states:

"Cleona Hooper is a known liquor law violator." The deponent denies that he had "a. current reputation of violating the whiskey laws" as of December 13, 1968.

Further deponent saith not.

Cleona Hooper

Sworn to and subscribed before me this ..... day of January, 1969.

.....
Notary Public

My Commission expires:

APPENDIX G

SEARCH WARRANT

To U. S. Marshal, or any other authorized federal officer:

Affidavit having been made before me by G. E. Childers, Sp. Inv. A&TTD that he has reason to believe that on the premises known as The Cleona Hooper residence consisting of a one story frame dwelling, more particularly described as follows: Commencing at the intersection Cosby Highway (St. Hwy. 32) and the Gatlinburg Highway (State Hwy. 73). (Also the location of Cosby Post Office) for the point of beginning. Thence in a southeasterly direction along the Cosby Highway (State Hwy. =32) pass the Smoky Mountain School, a distance of nine tenths miles to a white one story frame dwelling with black window shutters and a black composition asphalt shingle roof on the right side of Cosby Highway or the southerly side of Cosby Highway. This residence has a small red brick siding covered shed located directly behind the house. Including all outbuildings and appurtenance thereto. These premises are located in the Cosby section of Cocke County, Tennessee.

in the Eastern District of Tennessee there is now being concealed certain property, namely (here describe property) nontaxpaid distilled spirits and property intended to be used in violation of Internal Revenue Laws.

which are (here give alleged grounds for search and seizure) fit and intended for use in violation of Section 5601 (a) (12), 5604, 5686 (a).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing

grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken and prepare a written inventory of the property seized and return this warrant and bring the property before me, within ten days of this date, as required by law.

Dated this 13th day of December, 1968.

/s/ Kyle K. King
U.S. Commissioner

APPENDIX H

RETURN

I received the attached search warrant December 13, 1968, and have executed it as follows:

On December 15, 1968 at 1:00 o'clock PM, I searched (the premises) described in the warrant and

I left a copy of the warrant with (name of person searched or owner or "at the place of search") Cleona Hooper together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

111 gallons of Nontaxpaid Distilled Spirits

1—200 gallon metal mixing vat

1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C).

1—Double Felt Filter

1—20 gallon wash tub

82—Cases of 1/2 gallon glass jars (Empty)

94—Cases of one gallon jugs (Empty) (glass)

66—One gallon jugs (Empty) (plastic & glass)

91—Pint Isoprophyl Alcohol

11—Two pound cans of yeast.

This inventory was made in the presence of G. E. Childers and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Steve B. Whitlow

Subscribed and sworn to and returned before me this 16th day of December, 1968.

/s/ Kyle K. King
United States Commissioner

APPENDIX I

AFFIDAVIT FOR SEARCH WARRANT

BEFORE (Name of Commissioner) Kyle K. King (Address of Commissioner) Greenville, Tennessee

The undersigned being duly sworn deposes and says:

That he has reason to believe[1] that on the premises known as the Cleona Hooper residence consisting of a one story white frame dwelling, more particularly described as follows: Commencing at the intersection Cosby

1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C).

Highway (State Hwy. 32) and the Gatlinburg Highway (State Hwy. 73). (Also the location of Cosby Post Office) for the point of beginning. Thence in an southeasterly direction along the Cosby Highway (State Hwy. No. 32) pass the Smoky Mountain School a distance of nine tenths miles to a one story white frame dwelling with black window shutters and a black composition asphalt shingle roof on the right side of Cosby Highway or the southerly side of Cosby Highway. This residence has a small red brick siding covered shed located directly behind the house.

in the Eastern District of Tennessee there is now being concealed certain property, namely non-tax paid distilled spirits and property intended to be used in violation of Internal Revenue Laws

which are (here give alleged grounds for search and seizure) fit and intended for use in violation of Section 5601 (a)(12), 5604, 5[illegible]

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I have been an investigator for the U. S. Alcohol and Tobacco Tax Div. for the past seven years. I am very familiar with the methods employed by whiskey law violators in transporting, manufacturing and concealing non-tax paid distilled spirits. I am also familiar with the type of containers used by whiskey law violators in this section. On December 6, 1963, I received reliable official information that Cleona Hooper was concealing nontaxpaid distilled spirits at his home and in a small shed at the rear of his home. This information also revealed that Sundays were his principal days of operation. Cleona Hooper is a known liquor law violator with a federal criminal record and a current reputation of violating the whiskey laws.

On December 8, 1968, I was making observation with binoculars of Cleona Hooper's premises from a position about 75 yards to the rear of Hooper's house. At 3:55 p.m., a red Oldsmobile drove up to Hooper's house and parked in the yard at the side of Hooper's house. This car was occupied by two men. Hooper came out to the car and talked to the men and then returned to his house. At 4:00 p.m. a 1955 or 1956 Gray Chrysler arrived at the premises occupied by two colored males. Hooper came out of the house and directed the driver of the Chrysler to back up his car along side his house. Hooper then moved a 65 or 66 Chevrolet (blue) from the path of the Chrysler and the Chrysler backed in close to the front porch of the house. Hooper then went to a small building covered with red imitation brick covering at the rear of his house and returned to the Chrysler carrying a weighted box similar to those used in this area to package nontax paid distilled spirits. Hooper then loaded this case into the trunk of the Chrysler automobile. Then a tall slim colored male loaded the next six cases from the backporch of Hooper's house into the trunk of the Chrysler automobile. The tall slim colored male carried the above six cases from Hooper's backporch to Hooper, who was standing at the rear of the Chrysler. The colored male handed the cases to Hooper and he then placed the cases into the Chrysler automobile. Hooper then left the rear of the Chrysler and again went to the small building at the rear of his house and returned carrying another similar case which he loaded into the Chrysler automobile. Hooper and the colored male then each made several trips from the small building to the trunk of the Chrysler carrying several one gallon plastic jugs on each trip, similar to those used in this area to package nontaxpaid distilled spirits. At 4:05 p.m. the trunk of the

Chrysler was closed. The Chrysler then left in the direction of North Carolina Line. Then Hooper got into a blue car and left behind the Chrysler. The red Oldsmobile then left in the same direction behind Hooper.

s G. E. Childers
Signature of Affiant
Sp. Inv. A&TTD
Official Title, if any

Sworn to before me, and subscribed in my presence, December 13, 1968.

s Kyle K. King
United States Commissioner

SUPREME COURT, U.S.
FILED
OCT 21 1970
E. ROBERT SEAVER, CLERK

No. 620

In the Supreme Court of the United States

OCTOBER TERM, 1970

CLEONA HOOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILLIS WILSON,
Assistant Attorney General,

ROGER A. PAULEY,
CATHERINE KOLLER,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 620

CLEONA HOOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A7–A8) and the memorandum opinion of the district court (Pet. A1–A7) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1970. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including Sunday, August 30, 1970. The petition was filed on August 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

406-671—70

QUESTIONS PRESENTED

1. Whether the affidavit submitted to the Commissioner established probable cause for the issuance of the search warrant.

2. Whether the courts below properly held that the privilege against self-incrimination could not be asserted as a defense to petitioner's prosecution for violation of the federal tax laws relating to liquor.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on two counts charging the possession and concealment of non-tax paid liquor and property unlawfully used in connection therewith in violation of 26 U.S.C. 5686(a) and 26 U.S.C. 5601 (Pet. A–28). He was sentenced to a prison term of five years on count two and fined $2,500 on count one. The court of appeals affirmed (Pet. A–8).

The evidence showed that in December 1968, information was received by the Alcohol, Tobacco, and Firearms Division of the Department of the Treasury in Greenville, Tennessee, that petitioner was concealing non-tax paid alcohol in a shed at the rear of his home and that he was trafficking the liquor principally on Sundays (Tr. 18–19; Pet. A–35). Based on this information, federal agent Childer, who had seven years investigatory experience, maintained a surveillance of petitioner's residence on Sunday, De-

tember 8, 1968. He observed what appeared to be the loading of liquor from the shed and the back porch of the house into the trunk of an automobile; the case and jugs used were the kinds used by liquor law violators. The agent's affidavit for the warrant precisely detailed these activities, and further stated that petitioner was a "known liquor law violator with a federal criminal record and a current reputation of violating the whiskey laws" (Pet. A 35, 34–37). A search warrant based on this affidavit was obtained on December 13, 1968; and was executed on December 15, 1968 (Pet. A 32–33).

Following a hearing on petitioner's motion to suppress, the district court concluded that the affidavit disclosed probable cause for the search warrant. While the court indicated its concern as to the method of execution (Pet. A 5–6), and noted particular concern as to the inconsistency in agent Childer's testimony as to when petitioner was given a receipt for the items seized (Pet. A 2–3, 6), the court concluded that "in totality the search and seizure herein were not unreasonable" (Pet. A–7).

At trial, Agents Whitlow and Stratigus both testified that they found, in a small shed at the rear of petitioner's house, 111 gallons of non-tax paid liquor, 82 cases of one-half gallon glass jars, 66 one gallon jugs, a 200 gallon mixing vat, a double felt filter, a 20 gallon wash tub, and 91 pints of isopropyl alcohol (Tr. 10–13, 27–31).

ARGUMENT

I. Relying on *Spinelli* v. *United States*, 393 U.S. 410, petitioner argues that the affidavit did not set forth probable cause for the issuance of the search warrant. Although the affidavit (Pet. A 34–37) was not specific as to the source of the information about petitioner's illegal activities,[1] the personal observation of agent Childer tended to confirm that such information was based on more "than a casual rumor", and that it was obtained by the informant "in a reliable way" *Spinelli* v. *United States*, 393 U.S. 410, 416–417. The agent's surveillance thus corroborated that the informant knew the location of the non-tax paid liquor and the day of the week on which the loading operations principally occurred (Pet. A 35–37). See *Draper* v. *United States*, 358 U.S. 307. The experienced agent further concluded from his visual observations that the box and plastic jugs that he saw being transferred from the shed to the trunk of the waiting automobile were "similar" to the types of containers used in that area "to package non-taxpaid distilled spirits" (Pet. A–36). Considering in addition the agent's knowledge that petitioner was a "known liquor law violator with a federal criminal record and a current reputation of

[1] The affidavit of agent Childer stated that the information was both "reliable" and "official." The record shows, however, that this apparently refers to the fact that the information had been previously communicated to Childer by agent Whitlow, who initially received it (Tr. 18–21). We do not rely, therefore, on the characterization of the information in the affidavit as "official". While the actual underlying source of the information is not clear, it apparently was an informant (See Tr. 22).

violating the whiskey laws" (Pet. A-35),[2] there was ample probable cause, as both courts below found, for the issuance of the warrant. Accordingly, we believe the writ should be denied. Nevertheless, we recognize that the Court may wish to defer disposition until after it decides *United States* v. *Harris*, No. 30, this Term.

None of petitioner's other challenges to the warrant has merit. That a copy of the warrant and a receipt for the items seized were not given to petitioner directly after the search, as Rule 41(d) F.R. Crim P. directs, but instead were mailed to him the next day, constituted a technical defect which did not invalidate the otherwise lawful search. See *United States* v. *Haskins*, 345 F. 2d 111 (C.A. 6); *Evans* v. *United States*, 242 F. 2d 534 (C.A. 6), certiorari denied, 353 976. Equally insubstantial is the contention that there was an unreasonable delay in procuring the warrant. The agent made the visual observation on December 8 and obtained the warrant on the 13th; it was executed two days later. Less than ten days thus elapsed from the time of probable cause to the date of execution. See Rule 41(d). Finally, as the district court specifically found, the warrant itself (Pet. A 32-33) was sufficiently specific as to the items to be seized and the places to be searched (See Pet. A-1).

2. Petitioner further argues that the Fifth Amendment privilege against self-incrimination precluded

[2] This knowledge regarding petitioner—particularly the existence of a federal criminal record—was clearly more concrete than the reputation evidence found to be entitled to no weight at all in *Spinelli*, *supra*, 393 U.S. at 414.

his conviction. No valid Fifth Amendment defense arises, however, from the federal statutory scheme relating to liquor. That scheme is aimed at limiting participation in the liquor industry to those who engage in lawful activities; it is not a device for obtaining incriminating disclosures nor do the statutory provisions affect only a select group inherently suspect of criminal activities. All the courts of appeals to which the instant contention has been made have rejected it. *E.g.*, *United States* v. *Fricano*, 416 F. 2d 434 (C.A. 2); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *United States* v. *Dryden*, 423 F. 2d 1175 (C.A. 5), certiorari denied, 398 U.S. 950; *United States* v. *Whitehead*, 424 F. 2d 446 (C.A. 6).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILLI WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
COLLEEN KOLLAR,
Attorneys.

OCTOBER 1970.

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[2] Petitioner raises the same issue in a petition for a writ of certiorari from an affirmance of another conviction in No. 640, this Term. The contention is also posed in the petition in *Grooms* v. *United States*, No. 639, this Term.

U.S. GOVERNMENT PRINTING OFFICE: 1970